KEE HIN VENTURES SDN BHD v. GREAT PARTNERS INDUSTRIES LTD & ORS; CHENG PING KEAT & ORS (THIRD PARTIES)

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
[CIVIL SUIT NO: WA-22NCC-198-05-2018]
19 NOVEMBER 2021

Abstract – *When an agreement is discovered to be void, the restitutionary provision of s. 66 of the Contracts Act 1950 is triggered. However, being equitable in nature, the remedy is not available in an illegal contract, thus, the parties seeking restitution under s. 66 should not have knowledge of the illegality of the agreement at the time the agreement was made. In this case, the claim for restitution was defeated by the knowledge of the illegality of the agreements entered by the parties.*

CONTRACT: *Illegality – Restitution – Acquisition of company shares – Parties obtained financial assistance to acquire shares – Arbitral tribunal found financial assistance and agreements nullity for contravention of s. 67(1) of Companies Act 1965 – Whether defendants bound to return sums pursuant to s. 66 of Contracts Act 1950 – Whether company entitled to restitution – Whether defendants unjustly enriched – Whether parties knew of illegality of transactions – Whether defeated claims for restitution and unjust enrichment – Whether action caught by limitation*

WORDS & PHRASES: *'cause of action' – Meaning of, to compute limitation period – Whether cause of action must exist before one could claim relief – Whether cause of action in unjust enrichment gives rise to right to restitution – Conditions to be fulfilled*

The plaintiff was a holding company and its only asset were shares held in Khind Holdings Bhd ('Khind'). Dato' Cheng Hup held 50% shares, whilst his brother, Cheng King Fa ('CKF'), and CKF's son, Cheng Ping Keat ('CPK'), collectively held the balance 50% shares. When relations soured between Dato' CH, on the one side, and CKF and his son, on the other, Hady Hartanto ('Hady') was invited by CKF and CPK to invest and take up a stake in Khind through the purchase of Dato' CH's shares in the plaintiff. CPK, the first, second and third defendants, by four separate share sale agreements ('SSA'), purchased all of Dato' CH's shares resulting in CPK and CKF collectively owning 51% stake in the plaintiff, whilst the defendants collectively owned the balance 49%. The first and second defendants were the nominee companies of Hady whilst the third defendant was Hady's brother-in-law. The parties also entered into a shareholders agreement ('SA') to govern their relationship as shareholders of the plaintiff company. The

plaintiff obtained a loan from AmBank (M) Bhd ('AmBank'), secured by 12million Khind shares, to part finance the purchase of Dato' CH's shares. However, the plaintiff defaulted on the loan facility resulting in the 12million shares to be forced sold by AmBank. CPK and CKF commenced arbitration proceedings against the defendants to, amongst others, compel the defendants to buy back all the Khind shares force sold by AmBank. The arbitral tribunal dismissed the claims and held that the loan, together with the SA and the SSAs, were nullity for contravention of s. 67(1) of the Companies Act 1965 ('CA 1965'). Subsequently, the High Court allowed the defendants' application for recognition and enforcement of the award in the same manner as a judgment or order to the same effect whilst CPK and CKF's application for setting aside the enforcement order was dismissed by the High Court.

The plaintiff sought to recover from the defendants the sum of RM3,491,876.98 given in contravention of the prohibition against financial assistance in s. 67(1) of the CA 1965. The plaintiff claimed that: (i) pursuant to the findings of the arbitral tribunal, the SSAs and the agreement to finance were discovered to be void and the defendants were bound to restore the financial assistance provided under s. 67(6) of the CA 1965; and (ii) the defendants were unjustly enriched. The defendants filed a third-party claim against CPK, CKF and Dato' CH premised on their respective participation as directors and shareholders in procuring the plaintiff to furnish the security for the granting of the said loan facility and their breach of fiduciary duties in their capacity as directors at the material time. The central issue in this case was whether the defendants were bound to return the sum of RM5million to the plaintiff company pursuant to s. 66 of the Contracts Act 1950 ('Contracts Act') as the defendants were allegedly unjustly enriched and if so, whether the plaintiff's claim was defeated by: (i) limitation, *res judicata*/ estoppel by reason of the arbitral tribunal's findings and the plaintiff company's own involvement in the illegal scheme; (ii) whether the losses incurred was by reason of the plaintiff company's own default in its obligation to pay the instalment in respect of the loan facility; and (iii) whether the loan facility was secured by the plaintiff pursuant to a scheme to benefit CKF and CPK to entrench their position as majority shareholders in the plaintiff company.

Held (dismissing plaintiff's claim with costs; dismissing defendant's third-party claims with costs):

(1) Section 66 of the Contracts Act does not create a cause of action. It only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract (*Badiaddin Mohd Mahidin v. Arab Malaysian Finance Bhd*). The plaintiff's claim for restitution under s. 66 did not create a cause of action. (para 39)

(2) There is a need to refer to the meaning of 'cause of action' in order to compute the time the limitation period begins to run as the LA uses the phrase 'the date on which the cause of action accrued' or 'date of accrual of right of action'. In *Letang v. Cooper*, a 'cause of action' is defined as 'a factual situation the existence of which entitled one person to obtain from the court a remedy against another'. Hence, there must be a cause of action before a plaintiff could claim a relief in an action (*Hock Hua Bank Bhd v. Leong Yew Chin*). A cause of action in unjust enrichment can give rise to a right to restitution where it can be established that (i) the plaintiff must have been enriched; (ii) the enrichment must be gained at the defendant's expense; (iii) that the retention of the benefit by the plaintiff was unjust; and (iv) there must be no defence available to extinguish or reduce the plaintiff's liability to make restitution (*Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*). (paras 42, 47 & 48)

(3) The financial assistance, SSAs and the SA were not agreements that the plaintiff had 'discovered to be void' as it knew or ought to have known of the illegality. The parties had been represented by solicitors, and their solicitors could not have been ignorant that the whole arrangement was illegal at the outset. For the plaintiff to turn around and now say that it only discovered the illegality when the arbitral tribunal declared the transaction illegal was a mere afterthought. For s. 66 of the Contracts Act to apply, the invalidity of the agreement should be discovered subsequent to the making of it. This was contrasted to the position of the parties who were represented by solicitors whose knowledge will be regarded as imputed to the client by law, and as such, the parties here were all aware from the time they entered into the agreements the illegality of the transaction. (paras 51, 54 & 55)

(4) Restitution is a remedy aimed at restoring an injured innocent party to the position he was at, if not for the conduct of another. The injury, if unaddressed, would unjustly enrich the guilty party. Restitution and unjust enrichment, being founded on equitable principles, the law aids the vigilant and not the indolent. The plaintiff, not being an innocent party, was precluded from seeking restitution under s. 66 of the Contracts Act. The transaction was carried into execution and not merely executory. Further, the plaintiff's claim whether under s. 66 of the Contracts Act or for unjust enrichment is a claim for 'equitable relief' within the meaning of s. 6(6) of the LA. Accordingly, by reason of s. 6(6) of the LA, the six-year limitation period in s. 6(1) of the LA applies to a cause of action under s. 66 of the Contracts Act or for unjust enrichment – the cause of action accrued when the AmBank loan was defaulted when the defendants retained the benefit in question.

Consequently, the writ and statement of claim were time-barred under s. 6 of the LA. The plaintiff company's argument that its claim based on s. 66 of the Contracts Act and unjust enrichment was not and could not have been available earlier was rejected. (paras 56, 57, 59 & 70)

(5) The cause of action accrued on the date when the loan sum representing the 'enrichment' was transferred. The plaintiff, by its inactivity, was the author of its own misfortune. The plaintiff company ought to have watched the limitation clock to prosecute its claim diligently. There was nary a demand made when the loan was in default since 2005; neither was the plaintiff an innocent party as it participated in the illegal transaction to have CPK and CKF emerge as majority shareholders and to pay off Dato' CH. Therefore, the plaintiff's action against the defendants was time-barred. The plaintiff could not use its claim for restitution or unjust enrichment as an aid to circumvent the law on limitation particularly when the rationale for the existence of limitation laws is to ensure that claimants enforce their rights within the periods prescribed by law so that the defendants would not be faced with stale claims. (paras 64, 66 & 67)

(6) The factual matrix, viewed holistically, disclosed that the substance of the arrangements was to enable the plaintiff company to furnish, whether directly or indirectly, financial assistance for the purchase of its shares, and thereby, clearly contravened s. 67(1). Further, the arbitral tribunal's findings, *inter alia*, that CPK and CKF caused to be pledged the asset of the company, namely, the shares held in plc to the bank and borrowed money and that both were in *pari delicto*, had not been set aside. As such, the third parties' liability was co-ordinate, of the same nature and to the same extent as the defendants as participating parties to the illegality. The full payment for Dato' CH's shares was only made possible out of the unlawful conduct of each of the third parties. However, consequent to the dismissal of the plaintiff's claim, the defendants' third-party claim was also dismissed. (paras 2, 77 & 78)

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cartledge v. E Jopling & Sons Ltd [1963] 1 All ER 341 ***(refd)***

Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Hilton v. Sutton Steam Laundry (1946) 1 KB 65 ***(refd)***

Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors And Other Cases [1983] 2 CLJ 214; [1983] CLJ (Rep) 579 HC ***(refd)***

Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd [2017] 1 LNS 1566 CA ***(refd)***

Lim Kean v. Choo Koon [1969] 1 LNS 94 HC ***(refd)***

Lin Wen-Chih v. Pacific Forest Industries Sdn Bhd & Anor [2020] 1 LNS 2104 CA ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Majlis Bandaraya Petaling Jaya v. Digital Viva Sdn Bhd & Anor [2020] 3 CLJ 520 CA ***(refd)***
Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98 SC ***(refd)***
Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***
Mohd Sari Datuk Okk Hj Nuar & Ors v. Asia General Equipment And Supplies Sdn Bhd & Ors [2010] 6 CLJ 756 CA ***(refd)***
Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***
Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 1 LNS 127 FC ***(refd)***
Ong Ah Bee v Hii Chung Siong, Robin [1993] 1 CLJ 504 HC ***(refd)***
Paragon Union Bhd v. Prestamewah Development Sdn Bhd & Anor And Another Case [2018] 1 LNS 1049 CA ***(refd)***
Public Bank Bhd v. Ria Realiti Sdn Bhd & Ors [2021] 3 CLJ 772 CA ***(refd)***
Reeves v. Butcher [1891] 2 QB 509 ***(refd)***
Ricardo G Tapel v. Polar Twin Advance (M) Sdn Bhd; Nicholas Lee Zse Young & Anor (Third Parties) [2012] 1 LNS 800 HC ***(refd)***
Riches v. Director of Public Prosecutor [1973] 2 All ER 935 ***(refd)***
Soh Eng Keng v. Lim Chin Wah [1979] 1 LNS 98 HC ***(refd)***
Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 CLJ 141 FC ***(refd)***
Tan Kong Min v. Malaysian National Insurance Sdn Bhd [2005] 3 CLJ 825 FC ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(refd)***
United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor [1999] 2 CLJ 151 FC ***(refd)***
Yew Bon Tew v. Kenderaan Bas Mara [1982] 3 All ER 833 ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), ss. 67(1), (6), 132C, 181
Companies Act 2016, s. 123(1)
Contracts Act 1950, ss. 24, 66, 71
Limitation Act 1953, ss. 6(1), (4), (6), 7, 10(2), 11

Other source(s) referred to:
Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia,* Lexis Nexis, 2015, para 12.16, p 790

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For the defendants - Joseph Yeoh, Kelvin Ng & Lim Yin Shan; M/s HK Ang & Partners
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Reported by S Barathi

JUDGMENT

Liza Chan Sow Keng JC:

Introduction

[1] This action was filed by the plaintiff against the defendants in respect of financial assistance rendered in the defendants' acquisition of the plaintiff's shares grounded on restitution under s. 66 of the Contracts Act 1950 ("s. 66") and unjust enrichment.

[2] Due to the restrictions occasioned by the Covid-19 pandemic, in tandem with adapting to the 'new norm', the parties agreed that the trial be conducted virtually online by using the Zoom video conferencing platform. After a seamless and efficient full online trial held over four days, I have dismissed the plaintiff's claim with costs. Consequently, the defendants' third party claim was also dismissed with costs.

[3] This judgment contains the full reasons for my decision.

Background Facts

[4] The plaintiff (interchangeably "the plaintiff company") is a holding company. Its only asset is shares held in Khind Holdings Berhad ("Khind"), a public listed company.

[5] The shareholders in the plaintiff company were Dato' Cheng Hup ("Dato' CH") holding 50% shares whilst his brother, Cheng King Fa ("CKF"), and CKF's son, Cheng Ping Keat ("CPK") collectively held the balance 50% shares in the plaintiff company.

[6] When relations soured between the Dato' CH on the one side and CKF and his son on the other side, DW1, Hady Hartanto ("Hady") was invited by CKF and CPK to invest and take up a stake in Khind through the purchase of Dato' CH shares in the plaintiff company.

[7] The first and second defendants are nominee companies of Hady whilst the third defendant is Hady's brother in law.

[8] In the event, Dato' CH agreed to a buy out of all his shares for a sum of RM15.5M.

[9] The parties agreed to the following in respect of the purchase of Dato' CH's 50% shares in the plaintiff company:

(i) CPK will purchase 1 % of Dato' CH's shares for RM2M (making CPK and CKF the majority shareholders in the plaintiff company);

(ii) the first, second and third defendants collectively will purchase the remaining 49% shares of Dato' CH at a consideration of RM13.5M; and

(iii) the company is to borrow RM5M from AmBank (M) Bhd ("AmBank") to part-finance the purchase of Dato' CH's shares by pledging Khind shares belonging to the plaintiff company ("the financial assistance").

[10] CPK, the first, second and third defendants by four separate share sale agreements all dated 5 July 2003 ("SSA") purchased all of Dato' CH's shares resulting in CPK and CKF collectively owning a 51% stake in the plaintiff company whilst the defendants collectively own the balance 49%.

[11] On the same day, CPK, CKF, the first, second and third defendants entered into a shareholders agreement ("SA") to govern their relationship as shareholders of the plaintiff company.

[12] Pursuant to the AmBank loan, 12 million Khind shares belonging to the plaintiff were pledged as security for the RM5M loan. There is no dispute that the proceeds of this loan were eventually paid to Dato' CH as vendor of the shares acquired by the defendants.

[13] In 2005, the plaintiff defaulted on the loan facility resulting in the 12 million Khind shares to be forced sold by AmBank.

[14] Disputes arose between the shareholders of the plaintiff company leading to proceedings filed under s. 181 of the Companies Act 1965 ("CA 1965") which was stayed for the dispute to be referred to arbitration. CPK and CKF commenced arbitration proceedings against the defendants on 28 April 2014 to, amongst others, compel the defendants to buy back all the Khind shares force sold by AmBank.

[15] In the arbitral award dated 11 October 2016, the arbitral tribunal comprising Phillip Koh Tong Ngee, Datuk Wira Hj. Mohd Noor bin Hj Ahmad and Datuk Seri Gopal Sri Ram made a finding that the acquisition by the defendants of the 49% shares was made in contravention of s. 67(1) of the Companies Act 1965:

> 9. The claimants assert that if there was no agreement on the part of Hady to pay the full price for the shares he acquired, there was no reason for him to have made part payment to the bank. Hady's version is that he merely helped the claimants and made those payments as they were financially straitened at that time. The Tribunal accepts Hady's version. Given the business relationship and the comity between him and the Chengs, the story he told is consistent with the probabilities of the case. Indeed, there is evidence that he went so far as to assist the claimants to create a purchase of non-existent goods purely to create a pool of funds by drawing on the bank. This goes to show the extent to which Hady would go to help the claimants. It is clear that he became a shareholder of the subject company to enable the claimants to obtain majority control of it and as an investment he found attractive the terms offered to him. Hence, his story is the more probable and credible to him. Hence his story is the more probable and credible one in all circumstances of the case.
>
> 10. Accordingly, it is the finding of this Tribunal that the substratum of the claimant's case based on a breach by Hady of the SA (Shareholder Agreement) is without merit and that its complaints against the respondents detailed in the evidence presented to us are not credible. By contrast, the Tribunal finds the version provided by Hady to be credible and consistent with the probabilities of the case.

A

11. …

12. … The purpose of the entire transaction was directed at the acquisition of Dato' Cheng Hup's shares to ensure that the claimants obtained majority control of the subject company. And the Share Sale Agreements as well as the SA were all part and parcel of the machinery through which the target was to be achieved. It would therefore be consistent with commercial sense to read all these agreements together and consider the transaction as one. That then brings into sharp focus the methodology employed by the parties to acquire the shares from Dato' Cheng Hup.

B

13. What happened was this. **The claimants caused to be pledged the asset of the subject company, namely, the shares held in plc to the bank and borrowed money.** They then took this money and made part payment to Dato' Cheng Hup in consideration of his selling 49% of his holding in the subject company to the Indonesian. It is clear from this narrative that Section 67(1) of the Companies Act 1965 was contravened. That subsection provides:

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> Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

E

18. Apply that here. The subject company's asset was pledged to the bank as security for a loan. **That loan was used to pay off Dato' Cheng Hup who transferred his shares in the manner already described. Hady received financial assistance from the subject company to buy its shares.** That plainly falls within the scope of subsection (1) of section 67. The entire transaction, including the SA is a nullity. That is because SA was the product of and irretrievably interconnected with the Share Sale Agreements. In accordance with well-established law, **the loss must lie where it falls**. See, *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170. This is a case where the transaction was carried into execution. It was not merely executory. It follows that the shares which were registered in Hady's name remain his. **The claimants must suffer the loss occasioned to them in redeeming the pledged shares as they cannot, being in *pari delicto* enforce the SA (Shareholder Agreement) in any event.**

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(emphasis added)

H

[16] The arbitral tribunal dismissed the claims in its award. The loan, together with the SA and the SSAs were held to be a nullity for contravention of the then s. 67(1) CA 1965, now s. 123(1) CA 2016.

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[17] On 25 April 2018, the Kuala Lumpur High Court allowed the defendants' application for recognition and enforcement of the award in the same manner as a judgment or order to the same effect whilst on 16 July 2018, CPK and CKF's application for setting aside the enforcement order dated 25 April 2018 was dismissed by the Kuala Lumpur High Court.

[18] The plaintiff company in this action, seeks to recover from the defendants the sum of RM3,491,876.98 (RM5M less RM1,508,123.02) that was given in contravention of the prohibition against financial assistance in s. 67(1) CA 1965.

The Plaintiff's Case

[19] The plaintiff company claimed that:

(i) pursuant to the findings of the arbitral tribunal, the SSAs and the agreement to finance are discovered to be void. The defendants are bound to restore the financial assistance provided under s. 67(6) CA 1965; and

(ii) the defendants were unjustly enriched.

[20] The plaintiff stressed in submissions that it is not seeking to enforce a contract or to recover a loan.

The Defence

[21] In essence, the defendants contended that:

(i) the plaintiff's claim is time-barred under the Limitation Act 1953 ("LA 1953");

(ii) the losses incurred was by reason of the plaintiff's own default in its obligation to pay the installment in respect of the loan facility;

(iii) the plaintiff is estopped from claiming against the defendants in light of the arbitration findings of the award and by reason of the plaintiff's agreement and involvement in the scheme; and

(iv) abuse of process.

The Defendants' Claim For Indemnity Against The Third Parties

[22] The defendants filed a third party claim against CPK, CKF and Dato' CH premised on their respective participation as directors and shareholders in procuring the plaintiff company to furnish the security for the granting of the said loan facility and their breach of fiduciary duties in their capacity as directors at the material time.

[23] Additionally, it was contended that:

(i) the third parties benefited directly from the transaction ie, Dato' CH and both CPK and CKF received RM2.5M each from the RM5M loan; and

(ii) CPK and CKF being parties to the breach of s. 67(1) CA 1965 were found to be "in *pari delicto*" by the arbitral tribunal and are now liable to indemnify the defendants.

The Issues In The Main Action

[24] That the plaintiff company did give financial assistance to the defendants to purchase the plaintiff's shares from Dato' CH and that this is found to contravene s. 67 CA 1965 and as such illegal, is not in issue as made clear by the plaintiff company and defendants' respective pleadings and the findings of the arbitral tribunal. The central issue in this action is whether the defendants are bound to return the sum of RM5M to the plaintiff company pursuant to s. 66 of the Contracts Act as the defendants were allegedly unjustly enriched; and if so, whether the plaintiff's claim is defeated by:

(i) limitation;

(ii) *res judicata*/estoppel by reason of the arbitral tribunal's findings and the plaintiff company's own involvement in the illegal scheme;

(iii) whether the losses incurred was by reason of the plaintiff company's own default in its obligation to pay the instalment in respect of the loan facility; and

(iv) whether the loan facility was secured by the plaintiff company pursuant to a scheme to benefit CKF and CPK to entrench their position as majority shareholders in the plaintiff company.

[25] The plaintiff company relied on s. 67(6) CA 1965 for its claim. It reads:

> Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[26] As alluded to earlier, the plaintiff stressed that in seeking restitution under s. 66 of the Contracts Act, it is not seeking to enforce a contract or to recover a debt. Section 66 provides:

> 66. Obligation of person who has received advantage under void agreement, or contract that becomes void
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> When **an agreement is discovered to be void,** or when a contract becomes void, **any person who has received any advantage** under the agreement or contract **is bound to restore it,** or to make compensation for it, to the person from whom he received it.

The Illegality

[27] At the outset, it ought to be mentioned that the consideration or object of an agreement which is unlawful is not enforceable. Section 24 of the Contracts Act 1950 sets out what agreements are lawful:

> The consideration or object of an agreement is lawful, unless:
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> (a) it is forbidden by a law;
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> (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) it is fraudulent;
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> (d) it involves or implies injury to the person or property of another; or
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> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[28] The financial assistance in this case is in contravention of statute *viz* s. 67(1) CA but however, s. 67(6) is a saving statutory exception of the application of s. 24 of the Contracts Act thereby allowing recovery under the unlawful financial assistance. Question is whether the plaintiff company can overcome the defences raised.

Does Limitation Apply?

[29] The plaintiff company argued that once the agreement is discovered to be void, s. 66 is triggered; that s. 66 creates a right independent of a contractual obligation. It imposes an obligation on any person who has received an advantage under the agreement to restore it, citing *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91 at p. 94; *Public Bank Bhd v. Ria Realiti Sdn Bhd & Ors* [2021] 3 CLJ 772 at [59]-[63] and the Federal Court's decision of *Lori Malaysia Bhd v. ArabMalaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81 where in the latter case, the lender sought to enforce a security given for a loan allegedly used by the borrower company to purchase its own shares (contended to be similar to the plaintiff's case). Edgar Joseph FCJ held at pp. 1011-1012 (CLJ); pp. 100-101 (MLJ) that:

> Similarly, if a breach of s. 67 of the Companies Act has civil consequences, then the fact that the financier had no knowledge of the alleged illegality and the true nature of the transaction will not convert a void, illegal and unenforceable transaction into a legal one (see s. 24 Contracts Act and *Re an Arbitration between Mahmoud and Ispahani* [1921] 2 KB 716). Though, of course, in such a situation, **it would be possible for the financier to recover under s. 66 of the Contracts Act 1950 which is a restitutionary provision having no direct counterpart in English Law**. Section 66 provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

The 'advantage' under the section would, no doubt, include a loan, thus enabling a financier, with no knowledge of the illegality to recover (see *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91).

Professor Visu Sinnadurai in his helpful work on the *Law of Contracts in Malaysia and Singapore* (2nd Ed) has neatly summarised the effect of s. 66 thus:

> … section 66 is a restitutionary provision and **any remedy granted under the section is not based strictly on contract.** The general principle under English law is that the courts will not enforce nor grant any remedy under an illegal contract. However, one of the main exceptions to this rule is that an innocent party may obtain certain remedies, whereas no remedy is available to a guilty party. **Section 66 is a wide provision which has no direct parallel under English law.** English cases are, therefore, not relevant in determining the scope of s. 66. **If the agreement 'is discovered to be void', s. 66 will apply.** 'Discovered' has been interpreted to mean that the illegality must not have been known to the party seeking restitution under s. 66 at the time the agreement was made. In other words, no remedy will be granted to the guilty party under s. 66. In each case, therefore, the courts have to examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into.
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> (emphasis added)

[30] The plaintiff company next argued that there was enrichment at the plaintiff company's expense allegedly because of the loan it took to assist the defendants to pay for acquisition of shares – in settling the shareholders' advances, the purchase consideration was reduced accordingly. Therefore, s. 66 came into play ie, that defendants who had received an advantage (in the form of the reduced purchase consideration) under the void agreements are bound to restore it to the plaintiff from whom he received it.

[31] The plaintiff company argued that PW1 (CPK) testified that the plaintiff was only made aware that the financial assistance is discovered to be void on 11 October 2016 through the finding by the arbitral tribunal; the cause of action for unjust enrichment accrued from 11 October 2016 when the benefit retained by the defendants became unjust by dint of the arbitral award; and relied on the Federal Court case of *Tan Chee Hoe & Sons Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 CLJ 141; [2014] 3 MLJ 301 at [37]-[39]. The Federal Court granted the restitutionary relief sought by the plaintiff although the parties to the contract were in *pari delicto* when they consciously waived the requirements of s. 132C of the old Companies Act 1965 for the intended sale and purchase agreement.

[32] The defendants on the other hand, contended that the action brought by the plaintiff company after the expiration of six years from the date on which the cause of action accrued, whether founded on contract or to recover any sum recoverable by virtue of any written law, are time-barred under s. 6 LA 1953. Section 6 reads:

> Limitation of actions of contract and tort and certain other actions
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> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:
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> (a) actions founded on a contract or on tort;
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> (b) actions to enforce a recognisance;
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> (c) actions to enforce an award;
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> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.
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> (2) An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.
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> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.
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> (4) An action to recover any penalty or forfeiture or sum by way of penalty or forfeiture recoverable by virtue of any written law shall not be brought after the expiration of one year from the date on which the cause of action accrued:
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> Provided that for the purpose of this subsection the expression "penalty" shall not include a fine to which a person is liable on conviction for a criminal offence.
>
> (5) Nothing in this section shall apply to:
>
> (a) any cause of action within the Admiralty jurisdiction of the High Court which is enforceable *in rem* other than an action to recover the wages of seamen, or
>
> (b) any action to recover money secured by any mortgage of or charge on land or personal property.
>
> (6) Subject to sections 22 and 32 of this Act the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[33] It was posited on the defendants' behalf that the relevant dates to ascertain the accrual of plaintiff company's cause of action are:

(i) 2003 – Agreement to finance and loan was disbursed to purchase plaintiff's shares

(ii) September 2003 – The sale of plaintiff's shares was completed.

(iii) 2005 – Default in payment.

(iv) November 2006 – January 2008 – The shares were foreclosed.

(v) 31 May 2018 – Filing of the action herein.

[34] The defendants contended that there are three different dates in which the cause of action may have accrued:

(i) firstly, when the parties agreed to the shares to be pledged to AmBank as security for the RM5M loan in 2003; the year 2003 was the earliest date the plaintiff's cause of action would have accrued as the arbitral award in para 18 found that these agreements were a nullity by reason of illegality – as opposed to subsequently found to be void citing:

(a) *Reeves v. Butcher* [1891] 2 QB 509 at 511 where, Lindley LJ pronounced:

> **The cause of action arises at the time when the debt could first have been recovered by action.** The right to bring an action may arise on various events; but it has always been held that the **statute runs from the earliest time at which an action could be brought.**

(b) the Federal Court decision in *Nadefinco Ltd v. Kevin Corporation Sdn Bhd* [1978] 1 LNS 127; [1978] 2 MLJ 59 which adopted the English Court of Appeal's decision of *Reeves v. Butcher* [1891] 2 QB 509:

> The right to bring an action may arise on various events; but it has always been held that **the statute runs from the earliest time at which an action could be brought.**

(ii) secondly, if the defendants were mistaken as to the cause of action having accrued in 2003, the next possible date would be in 2005 when the plaintiff company defaulted in payment of the loan;

(iii) alternatively or thirdly, in 2006 when the shares were forced sold by the bank. In which event, the plaintiff's claim is still caught by s. 6 LA 1953.

[35] Counsel for the defendants postulated that it is trite that the limitation period starts to run when the cause of action is complete – *Lim Kean v. Choo Koon* [1969] 1 LNS 94; [1970] 1 MLJ 158; and the Court of Appeal's decision in *Lembaga Penggalakan Pelancongan Malaysia v. One Big Option Sdn Bhd* [2017] 1 LNS 1566; [2018] 1 MLJ 465.

[36] This court was referred to various cases by the defendants' counsel; a few interesting excerpts merit production:

(i) the Federal Court pronouncement in *Hj Hussin Hj Ali & Ors v. Datuk Hj Mohamed Yaacob & Ors And Other Cases* [1983] 2 CLJ 214; [1983] CLJ (Rep) 579; [1983] 2 MLJ 227 which adopted the decision in *Riches v. Director of Public Prosecutor* [1973] 2 All ER 935:

> … it is difficult to see why a defendant should be called on to pay large sums of his own money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been *barred by statute of limitation and must* fail.

(ii) the statement of Lord Greene MR in *Hilton v. Sutton Steam Laundry* (1946) 1 KB 65 at p. 73, where he said:

> *But the statute of limitations is not concerned with merits. Once the axe falls, it falls,* and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights.

(iii) *Yew Bon Tew v. Kenderaan Bas Mara* [1982] 3 All ER 833, where the Privy Council at pp. 839 to 840, per Lord Brightman said:

> When a period of limitation has expired, a potential defendant should be able to assume that he is *no longer at risk from a stale claim.* He should *be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence.*

(iv) *Tan Kong Min v. Malaysian National Insurance Sdn Bhd* [2005] 3 CLJ 825; [2006] 1 MLJ 601, where the Federal Court held:

> The point in time where all the *material facts were said to be in existence to render the cause of action complete would be after the sale had been conducted and the differential amount remaining due to the respondent had been ascertained.*

[37] The defendants contended that the plaintiff company's claim that the defendants have been unjustly enriched by the RM5M financial assistance is baseless:

(i) Section 71 of the Contracts Act deals with unjust enrichment. It states:

> 71. Obligation of person enjoying benefit of non-gratuitous act
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

(ii) Section 71 would only apply in the absence of a contract; and it does not apply where there was a request for that act in the first place. Citing *Ricardo G Tapel v. Polar Twin Advance (M) Sdn Bhd; Nicholas Lee Zse Young & Anor (Third Parties)* [2012] 1 LNS 800; [2013] 9 MLJ 69, where Varghese George J held as follows:

> [34] *Section 71 (and the Illustrations) made it clear that a right to 'restitution' would only come into operation where something was done or delivered by A to B, not at the request of B, and B following that, went on to derive benefit from the act. … s. 71 was of no help where there was a 'request' for that 'act or supply' in the first place; a request for such act or supply obviously would bring the resultant relationship into the realm of a contractual arrangement.*
>
> …
>
> [36] *It was clear therefore that, in law, s 71 could only be invoked, in the first place, if there was no request by the defendant for the 'loans' or the context was such as would be difficult to impute to the persons concerned a relationship actually created by contract. This was the threshold that had to be satisfied by the plaintiff, even before any considerations of the four ingredients were embarked upon.*
>
> … It was my conclusion therefore that the plaintiff had, on that ground alone, put himself out of any relief pursuant to s. 71, as not attempted to be pursued. It was the sole basis of the plaintiff's case that the monies were advanced at the request or behest of the defendant to assist the operational funds of the defendant.

(iii) In the present case, it was CKF who suggested that the shares were to be pledged. Hady entered into the transaction at the behest of both CPK and CKF;

(iv) all parties (the plaintiff, CPK, CKF and Dato CH) were acting in concert with regards to the plaintiff procuring a facility from the bank to repay the shareholders advances which Dato' CH *vide* his letter dated 16 October 2003 took it as payment towards a reduction of the payment of the total purchase price. The Board of Directors approved the RM5M overdraft facility to the plaintiff *vide* the resolution dated 5 August 2003 signed by CPK and Dato' CH;

(v) the actual direct beneficiaries for the RM5M loan was CPK, CKF and Dato CH as evidenced in Dato CH's said letter dated 16 October 2003 (pp. 198-199, CBD 1) and confirmed by CPK's testimony at pp. 33 and 34 of the notes of evidence:

JY	Clause 4.4, Mr Cheng. Would you look at Clause 4.4?
CHENG	Yes, ok.
JY	Isn't it stated there that the company intends to procure a facility from financial restrictions, for the purposes of repaying the shareholders advances?
CHENG	Ok, yes, I mean if this is the case, then it is true, sorry, I just now mentioned that I cannot remember.
JY	Sorry, never mind, let me repeat. When the RM2.5 million from the loan was paid out to you and your father, it was paid out to both of you as repayment of shareholders advances. Am I right? I can't hear you.
CHENG	Yes. It was paid out as repayment for shareholder advances.
JY	The same applies to the payment to Dato' Cheng Hup?
CHENG	Yes.

(vi) The parties including the plaintiff had knowledge of the arrangement and consented to all the decisions made. The plaintiff is therefore not entitled to claim for any relief pursuant to s. 71 for unjust enrichment which requires the doing of such acts without being first requested by the plaintiff.

(vii) A *fortiori*, there is no element of unjust enrichment in this case. The RM5M was utilised in accordance with the intention of the parties including the plaintiff. Also, as submitted above, the actual beneficiaries in so far as the loan was concerned is CPK, CKF and Dato' CH.

[38] In my view, when the defence of limitation is raised, the burden to prove that the action was commenced within the limitation period shifts to the plaintiff (see *Mohd Sari Datuk Okk Hj Nuar & Ors v. Asia General Equipment And Supplies Sdn Bhd & Ors* [2010] 6 CLJ 756; [2010] 5 MLJ 766; (CA); *Ong Ah Bee v Hii Chung Siong, Robin* [1993] 1 CLJ 504 at p 505). In *Cartledge v. E Jopling & Sons Ltd* [1963] 1 All ER 341, at p 352, the House of Lords per Lord Pearce said:

> I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proven an accrual of damage within the six years … the burden passes to the defendants to show that the apparent accrual of a cause of action is misleading and that in reality the cause of action accrued at an earlier date.

[39] I should mention at the outset that I agree with the defendants' counsel's assertion that the plaintiff's claim for restitution under s. 66 does not create a cause of action as held in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 at p. 95; [1998] 1 MLJ 393 (FC) at

p. 411 where Azmi FCJ said "It is necessary to bear in mind that s. 66 of the Contracts Act does not create a cause of action. It only confers a discretionary remedy in the nature of restitution to be exercised by the court within the ambit of the section and within the principles of the law of contract". The defendants submitted that the plaintiff's claim is in reality a claim for the recovery of a debt – the RM5M loan taken to finance the purchase by the defendants of Dato CH's shares in the plaintiff which the plaintiff contended that the defendants were supposed to service but failed to do so.

[40] If I am wrong that s. 66 creates a cause of action on its own, I would hold that the plaintiff company's claim is statute-barred for the reason that the financial assistance was not "discovered to be void" only on 11 October 2016 through the finding by the arbitral tribunal as set out in the discussion at paras. 49 to 55 of this judgment.

[41] I next deal with the dispute whether there is a cause of action in unjust enrichment and whether the plaintiff company's cause of action (if any) in unjust enrichment was barred by limitation. It goes without saying that whether or not a case of unjust enrichment has been established depends on the facts and circumstances of each case.

[42] In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453, the Federal Court in a judgment delivered by Azahar Mohamed FCJ (now CJM), after having reviewed and analysed numerous decided authorities in England and Malaysia, held *inter alia* as follows at paras. 110, 117 and 118:

> 110. Restitution simply means that a party who has received a benefit must restore the benefit received by him. The theoretical foundation of the right to restitution remedy as it is understood today is that it is founded on the law of unjust enrichment which fall outside the domains of contract and tort. The law of contract/tort and the law of unjust enrichment are conceptually distinct. Unjust enrichment describes a cause of action. On the other hand restitution describes a remedy. Restitution as a response to wrongdoing is therefore a different topic from restitution as a response to unjust enrichment (see *Goff & Jones on The Law of Unjust Enrichment* para 1-04). The courts have found it necessary to make available, independent of the law of contract and civil wrongs, for the restoration of benefits on the grounds of unjust enrichment.
>
> …
>
> [117] The above passages from the judgments of the House of Lords are instructive and are a significant contribution to the development of the law of unjust enrichment. The principle underlying the cases of *Banque Financiere de la Cite v. Parc (Battersea) Ltd. And Others* (*supra*) and *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v. Inland Revenue Commissioners and Another* (*supra*) is that, in the context of the present case, a cause of action in unjust enrichment can give rise to a right to restitution where it can be established that:

(a) The plaintiff must have been enriched;

(b) The enrichment must be gained at the defendant's expense;

(c) That the retention of the benefit by the plaintiff was unjust; and

(d) There must be no defence available to extinguish or reduce the plaintiff's liability to make restitution.

[118] Nearer home, there is now no longer any question that unjust enrichment law is a new developing area of law which is recognised by our courts. That the principle of unjust enrichment is the basis to justify an award of restitutionary relief can be seen in *Sediperak Sdn Bhd v. Baboo Chowdhury* [1999] 5 MLJ 220 and in *Air Express International (M) Sdn Bhd v. MISC Agencies Sdn Bhd* [2012] 4 MLJ 59. Nevertheless, it has to be said that despite the increase in judicial reference to the expression of unjust enrichment to justify an award of restitutionary reliefs, the law of unjust enrichment is still in its formative stage in our jurisdiction (see article entitled *'An Introduction to the Law of Unjust Enrichment'* [2013] 5 MLJ i by Alvin WL See). *In our view, the time has come for this court to recognise the law of unjust enrichment by which justice is done in a range factual circumstances, and that the restitutionary remedy is at all times so applied to attain justice.*

[119] Applying those principles, we now turn to consider whether the defendant has made out a cause of action in unjust enrichment: the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, that the plaintiff's enrichment at the defendant's expense was unjust, and whether there are any special defences to the claim. (emphasis added)

[43] For unjust enrichment, the plaintiff has to satisfy the four important conditions as decided by the Federal Court in *Dream Property*.

[44] On the entirety of the evidence, it is indisputable that the loan was used to partly pay for the shares; the defendants only paid RM8.5M, and RM5M came from the plaintiff company through settling the shareholders' advances and accordingly a corresponding reduction in the sale and purchase price for the same amount. As such, it does appear that the first three ingredients in *Dream Property* are satisfied *viz*: the defendants have been enriched; there was enrichment of the defendants at the plaintiff's expense; the retention of the benefit by the defendants was unjust, but what about the fourth ingredient – there must be no defence available to extinguish or reduce the defendants' liability to make restitution? Here, assuming that I am wrong, that there is a cause of action for unjust enrichment, the plaintiff company still has to overcome the hurdle of the defendant's defence of the action being time barred.

[45] Counsel for the defendants drew attention of this court to the recent Court of Appeal decision in the case of *Lin Wen-Chih v. Pacific Forest Industries Sdn Bhd & Anor* [2020] 1 LNS 2104; [2021] 4 MLJ 367 in a judgment delivered by Nantha Balan JCA stated that:

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> [178] … the cause of action in relation to the right to sue for recovery of a debt 'arises at the time when the debt could first have been recovered by action. *The right to bring an action may arise on various events; but it has always been held that the statute (of limitation) runs from the earliest time at which an action could be brought'*.

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> [179] As stated earlier, the period of limitation for a cause of action for breach of contract (in writing) is six years (per item 95 of the Schedule). *And the limitation period for a cause of action for unjust enrichment is also six years* (per item 97 of the Schedule). In the context of the claim for unjust enrichment, it is relevant to mention that the claim is for restitution.

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[46] Whilst I agree that the statute of limitation runs from the earliest time at which an action could be brought, it is to be noted that the Court of Appeal in *Lim Wen-Chih* was dealing with the Sabah Limitation Ordinance.

[47] In the considered opinion of this court, there is a need to refer to the meaning of 'cause of action' in order to compute the time the limitation

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period begins to run. The Limitation Act 1953 uses the phrase "the date on which the cause of action accrued" or "date of accrual of right of action" see eg. s. 6(1), s. 6(4), s. 7, s. 10(2), s. 11, etc. The limitation clock as such, starts ticking from the date of accrual of the cause of action or right of action. Hence, the critical question for purposes of limitation is: when did the "cause

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of action" arise? This necessarily calls for an examination of the concept of "cause of action".

[48] As to the meaning of the phrase 'cause of action', I can do no better than to reproduce the distillation of the Federal Court in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207; [2014] 2 MLJ 749 where Jeffrey

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Tan FCJ referred to various cases in which the term had been defined or discussed:

> [12] In *Letang v. Cooper* [1965] 1 QB 232, at pp 242-243, Lord Diplock defined a 'cause of action' as **'a factual situation the existence of which entitled one person to obtain from the court a remedy against another'**,

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which definition was adopted in *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 MLJ 230, where Abdul Hamid Ag LP, as he then was, appended that 'there must be a cause of action before a plaintiff can claim a relief in an action'. In *Government of Malaysia v. Lim Kit Siang, United Engineers (M) Berhad v. Lim Kit Siang* [1988] 2 MLJ 12 at p 19, the Supreme Court per Salleh Abbas CJ, expounded that to make up 'a cause of action', **first,**

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the plaintiff has a right at law or by statue and secondly, the right has been affected by the act of the defendant:

> > A cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an

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action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232 at p 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the court a

> remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudiced by the appellant/defendant's act.

[13] But other than that addendum by Salleh Abas CJ, the definition of 'cause of action' as expounded in *Letang v. Cooper* was readily adopted, by the former Supreme Court in *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 MLJ 474 and *New Zealand Insurance Co Ltd v. Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185, and by the Court of Appeal in *Indah Desa Saujana Corp Sdn Bhd & Ors v. James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11, *Lembaga Kumpulan Wang Simpanan Pekerja v. Ong Lian Chee (suing as administrator of the estate of Goh Tin Poh, deceased)* [2010] 4 MLJ 762, and *Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 2 MLJ 192.

[14] Other authorities, *inter alia*, *Tuan Haji Ishak bin Ismail & Ors v. Leong Hup Holdings Bhd And Other Appeals* [1996] 1 MLJ 661, *Mohamed Yusop bin Abdul Wahab v. American Express (M) Sdn Bhd* [2002] 6 MLJ 507, *Goh Joon v. Kerajaan Negeri Johor & Ors* [1998] 7 MLJ 621, applied the following definition found in *Stroud's Judicial Dictionary* (5th Ed) at p 378: A **'cause of action' is the entire set of facts that gives rise to an enforceable claim**; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR, *Read v. Brown* (1988) 22 QBD 128; this case was applied in *Bennett v. White* [1910] 2 KB 643).

[15] In *Nasri v. Mesah* [1971] 1 MLJ 32, the Federal Court per Gill FJ, as he then was, depicted 'a cause of action' as follows:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* (1888) - 22 QBD 128 at p 131). In *Reeves v. Butcher* [1891] 2 QB 590 at p 511 Lindley LJ said:

[16] Gill FJ, then thus enunciated on 'the date of accrual' in the case of a debt:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 509 at p. 511, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> > In *Board of Trade v. Cayzer, Irvine & Co* [1927] AC 610 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause

> of action founded on a contract accrues on the date of its breach. *Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field X in Gibbs v. Guild 8 QBD 296 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement* (see *Bolo*'s case LR 57 IA 74). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. (emphasis added)

> [17] And *Nasri v. Mesah*, we observe, is still good law (see the Federal Court cases of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1984] 2 MLJ 280, *Insun Development Sdn Bhd v. Azali bin Bakar* [1996] 2 MLJ 188, and *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209, which followed *Nasri v. Mesah*) which we readily endorse. A cause of action founded on a contract accrues on the date of its breach, and in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action. (see pp. 757 to 759 of the judgment) (emphasis added)

[49] I do not agree with the plaintiff's postulation that its claims are not time-barred on the basis that illegality accrued when the arbitral tribunal declared the transaction illegal on 11 October 2016 which is when according to PW1, CPK's testimony that the transaction was discovered to be void. My reasons follow. It is also clear to me that the arbitral tribunal instead found the SSAs, SA and loan agreement to be a nullity.

[50] In *Soh Eng Keng v. Lim Chin Wah* [1979] 1 LNS 98; [1979] 2 MLJ 91, Wan Yahya J (as His Lordship then was) delineated the limits of the application of this provision:

> I am of the firm opinion that the words 'discovered' and 'becomes' appearing in s. 66 above are not superfluous words used by the legislators. On the contrary, they are words inserted in that section for a specific reason and that is to qualify or restrict the type of agreement to which that section will apply. As I have said in the earlier case, the term "discover" here clearly indicates something which the parties were unaware of at the time of making the agreement and which they gained sight of or detected subsequently and the word 'becomes' refers to something not present when the contract was signed but came into being at a later stage.

[51] In my respectful view, the financial assistance, SSAs and SA were not agreements that the plaintiff had "discovered to be void" as it knew, or ought to have known of the illegality. For starters, CPK gave evidence in the arbitration (p. 150, line 18-22, notes of evidence, CBD 3) that:

CHENG …Then later, I think, Steve. Steve is Hady's accountant side, ok? And the lawyer advise him that he, the company cannot fund the shareholder to buy the share, ok? …

[52] The plaintiff company was represented by solicitors in the loan agreement. Pages 43 of the notes of evidence:

JY Alright and the Plaintiff company itself were also advised by solicitors?

CHENG Let me see, in this case, for which purpose?

JY In the loan, sorry. I should specify, in the loan.

CHENG At the loan, yes, we do.

JY In the loan application.

CHENG The, yes.

JY You are represented by solicitors as well, right?

CHENG Yes.

[53] It is also readily discernible from the SSA between Dato' CH and the first defendant, both purchaser and vendor were represented by solicitors, Messrs Lee Choon Wan & Co and Messrs Raslan Loong respectively, the same solicitor Hong Sze Sew who witnessed Dato' CH's signature witnessed Dato' CH's signature as vendor on all the other three SSAs, the SA was prepared by Messrs Raslan Loong; CPK signed the loan offer letter dated 4 August 2003 addressed to the plaintiff; the plaintiff's resolution dated 5 August 2003 accepting the loan facility was signed by CPK and Dato' Cheng Hup. The RM5M (referred in cl. 4.4 of the share sale agreement dated 5 July 2003 at p. 101, CBD 1) was utilised by the plaintiff to pay off shareholders advances to Dato' CH and CKF (RM2.5M each); CKF's portion made its way to Dato' CH who *vide* his letter dated 16 October 2003 at pp. 198-199, CBD 1 copied to the solicitors Messrs Raslan Loong and Messrs Lee Choon Wan & Co took the RM5M as payment towards a reduction of the total purchase price of RM15.5M. Demonstrably, at the outset, the plaintiff through its directors, CPK, CKF and Dato' CH participated in the illegality. CPK in fact testified that it was his father, CKF who suggested the pledging of 12 million shares in Khind to secure the RM5M loan. This was corroborated by CKF's note dated 18 June 2003 to one Mindy at pp. 86-91, CBD 1.

[54] That the parties were represented by solicitors at the time the agreements were entered into is crucial. Each of them was in a position to obtain any legal advice when they each entered into the agreements. The less than attractive posit of the plaintiff company to turn around and now say through the testimony of CPK that it only discovered the illegality on 11 October 2016 when the arbitral tribunal declared the transaction illegal appeared to me to be a mere afterthought after I have treated his evidence with extreme caution. It is not unwarranted on my part to infer that the

parties' solicitors could not have been ignorant that the whole arrangement was illegal at the outset. In *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; [1996] 2 MLJ 141, at p. 500 (CLJ); p. 148 (MLJ), the Court of Appeal held:

> It cannot be doubted for a moment that the parties in the present case were in *pari delicto* when they entered into the illegal tenancy agreement. **After all, the tenancy agreement was prepared by a solicitor.** This is, therefore, not a case where the contract may be said to be discovered to be void under s 66 of the Contracts Act 1950. See, *Soh Eng Keng v. Lim Chin Wah* [1979] 2 MLJ 91. (emphasis added)

[55] In my respectful view, for s. 66 to apply, the invalidity of the agreement should be discovered subsequent to the making of it. The opening words of s. 66 "when an agreement is discovered to be void, or when a contract becomes void" are in clear as day language. This is contrasted to the position of parties who were represented by solicitors, whose knowledge will be regarded as imputed to the client by law, and as such the parties here were all aware from the time they entered into the agreements, the illegality of the transaction. In this regard, it is useful to refer to *Lori Malaysia*'s case where the Federal Court cited with approval Professor Visu Sinnadurai's explanation in his book on the scope of s. 66:

> If the agreement 'is discovered to be void', s. 66 will apply. 'Discovered' has been interpreted to mean that the *illegality must not have been known to the party seeking restitution under s. 66 at the time the agreement was made.* In other words, *no remedy will be granted to the guilty party under s. 66. In each case, therefore, the courts have to examine the facts of the case to determine whether the party was aware of the illegality at the time the agreement was entered into.*

[56] Not only that, restitution is a remedy aimed at restoring an injured innocent party to the position he was at if not for the conduct of another. The injury if unaddressed, would unjustly enrich the guilty party. Reverting to the matter at hand, the plaintiff company not being an innocent party (see *Lori Malaysia*'s adoption of Prof Visu's explanation above on scope of s. 66), is precluded from seeking restitution under s. 66. Another appreciable difference from the *Lori Malaysia* case is that here, the transaction was carried into execution and not merely executory.

[57] In the instant case before the court, even if I am wrong that restitution under s. 66 avails the plaintiff company, I am nevertheless of the view that the plaintiff company's claim whether under s. 66 of the Contracts Act or for unjust enrichment is a claim for "equitable relief" within the meaning of s. 6(6) LA 1953. Accordingly, by reason of s. 6(6) LA 1953, the six-year limitation period in s. 6(1) LA 1953 applies to a cause of action under s. 66 or for unjust enrichment – the cause of action accrued when the AmBank loan was defaulted when the defendants retained the benefit in question – see the third element for an unjust enrichment claim as laid down in *Dream Property.*

[58] In the considered opinion of this court, whichever way one slices it, the earliest time the plaintiff company could have sued for recovery of unjust enrichment (if any) was:

(i) in the year 2003 – as the agreements were a nullity from inception as found by the arbitral tribunal – it must be noted here that the plaintiff company was represented in the loan transaction by Messrs Raslan Loong who was copied Dato CH's letter dated 16 October 2003 at CBD1 pp. 198-199; (limitation period commences at the earliest time when a plaintiff can commence a suit), the limitation period for the plaintiff company's cause of action for unjust enrichment accrued in 2003 and would be time-barred in 2009;

(ii) in the year 2005, shortly after it was made clear that the loan was in default when the defendants refused to advance any more money to service the loan – the plaintiff's cause of action for unjust enrichment accrued in 2005 would be time-barred in 2011; or

(iii) in 2006, placing the plaintiff's claim at the highest (the forced sale of the Khind shares) – the plaintiff's cause of action for unjust enrichment accrued in 2006 would be time-barred in 2012.

[59] Consequently, the writ and statement of claim when issued on 31 May 2018 were time-barred under s. 6 LA 1953. I reject the plaintiff company's argument that its claim based on s. 66 and unjust enrichment was not and could not have been available earlier.

[60] The Supreme Court in *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 at p. 76; [1991] 1 MLJ 409 at p. 413 stated:

> The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is nonexistent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
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> **The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly to have a definite end to litigation.** This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. **The rationale of the limitation law should be appreciated and enforced by the Courts.**

[61] The limitation law is premised upon public policy considerations. As it is the plaintiff company's case that the defendants ought to pay for the loan, going by the dates set out in para. 58 of this judgment, any action after 2012 is statute-barred. There was already in existence a cause of action since 2006 (at the latest) for restitution or for unjust enrichment. As held by Hashim Yeop Sani CJ Malaya, speaking for the Supreme Court in *Credit Corp (M) Bhd v. Fong Tak Sin* (*supra*) at p. 72 (CLJ); p. 411 (MLJ):

A From established authorities *we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.*

[62] The plaintiff company's argument in reality effectively means there is B no limitation period whatsoever for the cause of action in unjust enrichment as discovery of illegality can also be 20 years down the line. This is in direct contrast to a case of fraud where the LA 1953 expressly provided for the limitation clock to tick from date of discovery of fraud.

[63] The plaintiff's reference to the learned author Low Weng Tchung C views in *The Law of Restitution and Unjust Enrichment in Malaysia* (Lexis Nexis, 2015) at para. 12.16, p. 790 in fact does not assist its case, far from it:

However, *there may be cases in which it will not be appropriate to regard the cause of action as arising on the date the money or benefit or advantage is received by the* D *defendant* … The better view is that a claim for restitution accrues at the date when the enrichment is received or *the date the ground of restitution is established, whichever is the later* … in proper cases the cause of action should be regarded as arising on the date when *the basis for the transfer of a benefit or advantage is discovered to have been invalid, or has subsequently failed to materialise or can no longer be performed or carried out.*

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[64] In my view, if the learned author's rationale is applied, the transfer of benefits or enrichment arouse in 2003 when the defendants and CPK acquired Dato' Cheng Hup's shares with the RM5M AmBank loan. The cause of action accrued on the date when the loan sum representing the "enrichment" was transferred. The plaintiff company cannot have its cake F and eat it as it is also the plaintiff company's case that the defendants were to pay for the AmBank loan, and in fact in the course of trial accepted that the defendants have in fact prior default of the loan, made payment of a sum of RM1,508,123.02 and as such, the plaintiff company confined itself to a reduced claim of RM3,491,876.98 (RM5M less RM1,508,123.02) against G the defendants.

[65] The plaintiff company's heavy reliance on the cases of *Tan Chee Hoe* and *Paragon Union Bhd v. Prestamewah Development Sdn Bhd & Anor And Another Case* [2018] 1 LNS 1049; [2018] 4 MLJ 307 do not assist their case H one whit. I agree with the legal principles and the correct observations in the two cases. They served justice in the two cases which the principles were applied to the facts there. In both cases, the respective agreements were not completed, void from the day of execution, and therefore in both cases, restitution under s. 66 was ordered where the defendant who had received an advantage (the deposit of RM1.6M in *Tan Chee Hoe*'s case and RM18M I in *Paragon Union*'s case) under the respective void agreements was bound to

restore it to the plaintiff. Suffice to say, it is evident that both cases however, did not discuss the limitation defence that calls for determination in the present case.

[66] For the reasons given, this court holds that the plaintiff company's action against the defendants is time-barred. The plaintiff company cannot use its claim for restitution or unjust enrichment as an aid to circumvent the law on limitation particularly when the rationale for the existence of limitation laws is to ensure that claimants enforce their rights within the periods prescribed by law so that defendants would not be faced with stale claims.

[67] This court noted that the defendants did not prevent the plaintiff company from suing them; neither was there any forbearance to sue. Harsh as it may sound, the stark reality is, the plaintiff company by its inactivity, is the author of its own misfortune. Like any vigilant litigant, the plaintiff company ought to have watched the limitation clock to prosecute its claim diligently. As alluded to by the defendant's counsel, there was nary a demand made when the loan was in default since 2005; neither was the plaintiff company an innocent party as it participated in the illegal transaction to have CPK and CKF emerged as majority shareholders and to pay off Dato' CH. As pointed out by the defendants' counsel, this arrangement of having Dato' CH exit the plaintiff company prevented the two factions of the then shareholders from further colliding and having their disagreements and disputes escalate which would not be for the plaintiff company's benefit.

[68] If the plaintiff company is unable to prove the action is brought within the limitation period, the claim shall be dismissed – *Mohd Sari Datuk Okk Hj Nuar & Ors v. Asia General Equipment And Supplies Sdn Bhd & Ors* [2010] 6 CLJ 756; [2010] 5 MLJ 766.

[69] Having found that the plaintiff company's claim is statute-barred, on this ground alone, the claim should be dismissed. The other issues raised, in my view are no longer relevant.

[70] In addition, it is trite that restitution and unjust enrichment being founded on equitable principles, the law aids the vigilant and not the indolent.

[71] For the reasons given, I am not able to exercise my discretion to order any restitution or compensation. The plaintiff company's claim is dismissed with costs.

A **The Defendants' Claim For Indemnity Or Contribution Against The Third Parties**

[72] Third-party proceedings ought to await the determination of the plaintiff's action against the defendants first. In *Mat Abu Man v. Medical Superintendent, General Hospital Taiping & Ors* [1989] 1 CLJ 137; [1989] 1 CLJ (Rep) 98; [1989] 1 MLJ 226, the Supreme Court held as follows at p. 101 (CLJ); pp. 226 & 228 (MLJ)):

> (2) Third-party proceedings for contribution should be regarded as independent of and separate from proceedings by a plaintiff against a defendant. *When a defendant is made liable to the plaintiff, he then has a right open against a third party to establish he possess a right to contribution or indemnity from the third party*. Time should begin to run from the date the defendant is liable.
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> …
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> We also do not think that a proceeding under O 16 of the Rules of the High Court 1980 is intended to be treated in the same way as an action between a plaintiff and a defendant.

[73] In *United Merchant Finance Bhd v. Majlis Agama Islam Negeri Johor* [1999] 2 CLJ 151; [1999] 1 MLJ 657 at p. 158 (CLJ); p. 662 (MLJ) the Federal court held:

> … With respect, we do not think this is correct because third party proceedings are independent proceedings between a defendant as plaintiff and a third party as defendant (*Mat Abu bin Man v. Medical Superintendent, General Hospital Taiping, Perak & Ors* [1989] 1 MLJ 226 SC). Secondly, *the determination of the question in the third-party proceedings has to await the determination of the issues in the plaintiff's action against the defendant* (See: *Ng Kim Hwa v. Ng See Chow & Ors.* [1993] 2 MLJ 155). See also Summons for Third Party Proceedings (Form 26) which stipulates: "And that the question of the liability of the said third party to indemnify the defendant be tried at the trial of this action, but subsequent thereto.
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> (emphasis added)

[74] In *Majlis Bandaraya Petaling Jaya v. Digital Viva Sdn Bhd & Anor* [2020] 3 CLJ 520; [2020] MLJU 88, the Court of Appeal stated:

> [29] As can be seen from a perusal of O 16 rule 3 above, the whole concept of *a third-party proceedings is that it is an independent proceeding between a defendant as a plaintiff and a third party as a defendant. The defendant takes a third party proceeding against the third party to seek for contribution or indemnity in the event the defendant is found liable, and it was not intended to be treated in the same way as an action between a plaintiff and a defendant.* The effect is that a third-party proceedings constitute a separate action between a defendant and a third party within the main action …
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> …

[32] A case in point is the case of *Edison & Swan United Electric Light Co v. Holland* [1889] 41 Ch. 28, where it was held as follows:

A curious point has been raised after judgment in this case. The Plaintiffs now ask the Court to treat the third parties in this action as if they were defendants to the action, not only to the extent of making them pay costs, but also to the extent of granting relief against them by way of injunction. That, however, would, I think, be wrong, because *the third parties are not in reality defendants.* (emphasis added)

[75] Having found the defendants have succeeded in their defence based on limitation, and therefore not liable to the plaintiff company, I have dismissed the plaintiff company's claim with costs. As a natural consequence thereto, the defendants' third party claims against CPK, CKF and Dato' CH are dismissed with costs.

[76] If I am wrong in dismissing the plaintiff company's claim, on the factual matrix of this case, I am of the view that the defendants are entitled to contribution from CPK, CKF and Dato' CH for the full amount of RM3,491,876.98 for the following reasons:

(i) the third parties proposed, agreed and were responsible for having procured the financial assistance; the plaintiff company's Board resolution accepting the loan was signed by CPK and Dato' CH;

(ii) the third parties all benefited from the illegal transaction of pledging the shares to secure the RM5M loan;

(iii) the direct beneficiaries for the RM5M loan were CPK, CKF and Dato CH as they had their shareholders' advances repaid by the plaintiff company through the loan;

(iv) the loan facilitated the buy out of all Dato' CH's shares;

(v) after CPK's acquisition of the 1% of Dato' CH's shares, CPK and CKF became the majority shareholders thereby giving them majority control of the plaintiff company;

(vi) CPK and CKF being parties to the breach of s. 67(1) of the Companies Act 1965 were held to be in *pari delicto* by the arbitral tribunal which found *inter alia*, as follows:

Para 10: Accordingly, it is the finding of this Tribunal that the substratum of the *claimant's ("CPK & CKF") case based on a breach by Hady of the SA ("Shareholder Agreement") is without merit and that its complaints against the respondents* detailed in the *evidence presented to us are not credible*

Para 12 … The *purpose of the entire transaction was directed at the acquisition of Dato Cheng Hup's shares to ensure that the claimants ("CPK & CKF") obtained majority control* of the subject company. *And the Share Sale Agreements as well as the SA were all part and parcel of the machinery through which the target was to be achieved.*

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Para 13: What happened was this. *The claimants (CPK and CKF) caused to be pledged the asset of the subject company, namely, the shares held in plc to the bank and borrowed money.* They then took this money and made part payment to Dato' Cheng Hup in consideration of his selling 49% of his holding in the subject company to the Indonesian ...

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Para 18: *The claimants (CPK and CKF) must suffer the loss occasioned to them in redeeming the pledged shares as they cannot, being IN PARI DELICTO enforce the SA (Shareholder Agreement) in any event.*
(emphasis added)

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[77] The defendants' assertion to have the third parties made liable to contribute or indemnify is not an unpersuasive argument by any means as the factual matrix viewed holistically, disclose that the substance of the arrangements is to enable the plaintiff company to furnish, whether directly or indirectly, financial assistance for the purchase of its shares and thereby clearly contravened s. 67(1). It must be remembered that it is a finding of

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the arbitral tribunal that "The claimants (CPK and CKF) caused to be pledged the asset of the subject company, namely, the shares held in plc to the bank and borrowed money" and that both were in *pari delicto.* These findings have not been set aside. As such, in my utmost respectful view, and paying due heed to the numerous authorities cited by the parties, I find that

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the third parties' liability was co-ordinate, of the same nature and to the same extent as the defendants as participating parties to the illegality.

[78] Bearing in mind the mischief s. 67(1) was intended to prevent, as a matter of common business sense, these three persons should have been obvious defendants but of course, CPK and CKF as directors of the plaintiff

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company would not cause the plaintiff company to sue themselves or Dato' CH due to familial ties. CPK and CKF in fact are represented by the same solicitors as the plaintiff company's solicitors. This omission to join CPK, CKF and Dato' CH as defendants is crucial for the reason that they were complicit. With respect, despite the outward appearance that the sum be used

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to directly set off the liabilities of the plaintiff company *viz* payment to CKF and Dato' CH in respect of the shareholders advances, the common intention of the parties was that the loan be used to defray the liability of paying for Dato CH's shares. In my view, full payment for Dato CH's shares was only made possible out of the unlawful conduct of each of the third parties.

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Unquestionably, the third parties were participating parties to the illegality. If the defendants are to be found liable, in the circumstances of this case, arguably, it would be scandalous not to make the third parties contribute to the whole extent of the RM3,491,876.98 now claimed by the plaintiff company against the defendants.

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[79] In addition, the irrefragable evidence in this case is that the third parties received the RM5M loan disbursed by AmBank (see CPK's evidence at para. 37(v) above). If the defendants are liable, each of the third parties is equally liable to contribute for the reasons given.